IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 229

THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

vs.

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

PETITION FOR REHEARING.

E. B. ASHBAUGH,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 229

THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

vs.

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

PETITION FOR REHEARING.

Comes now the appellant above named and respectfully presents this petition for a rehearing of this case, and further asks that the same may be set down for another argument at the same time as the argument to be presented to this Court in the case of the Marion and Rye Valley Railroad Company against the United States, number 991 of the present docket, as these cases grow out of the same transactions had with short-line railroads under the Federal Control Act, and that it may be set for hearing at an early convenience of the Court.

Basis of Petition.

This petition refers not only to the difficulties of the short-line railroad companies, but equally to the difficulties before the Director General, the Interstate Commerce Commission, and the Treasury Department in settling the claims as directed by Congress in the Federal Control Act and the Transportation Act of 1920. These acts of Congress are directly involved and are of more lasting administrative value than the millions of money in question. The first sections of the Transportation Act of 1920, as well as the first sections of the Federal Control Act of 1918, must be construed together. These sections are parts of the same subject, but they have been seriously misconstrued.

The appellant does not allege that the reconsideration of the appellant's original argument is the sole reason for this petition; but it relies upon the statements in the appellant's brief and oral argument before this Court as one reason why a rehearing should be had, but in addition the appellant alleges that the consequences following the decisions of the Court in these short-line cases are of such a nature and of such an unexpected extent that a re-examination of the issues should be had before the Court. These consequences indicate something wrong. Departmental construction is overturned. The several departments construed these laws immediately after their enactment by Congress, and are still construing them daily in the settlement of the claims of these railroads growing out of Federal control for not only the first six months, but for the last 20 months of the Federal Control period. Many millions of dollars have been paid out

upon this departmental construction given by the Interstate Commerce Commission and the Treasury Department, which departmental construction is in direct conflict with the decision of this Court holding that the contracts set out in the petitions are receipts in full for all claims against the United States based upon the Federal Control Act. If this decision is a correct construction of the contract in issue, then the Interstate Commerce Commission, under the Transportation Act of 1920, has paid out many millions of dollars in settlement of these claims arising during the last 20 months of the Federal Control period when that Commission had before it about 120 similar co-operative contracts which are now held to be receipts in full for all claims during the whole period of Federal control.

It is apparent that if these contracts were receipts in full for all claims arising in favor of the railroad and against the Government during the period of Federal control, then the payment of these claims arising during the last 20 months of that period must inevitably have been made in direct violation of law and in disregard of such receipt, and under such circumstances the railroads receiving such payments would be compelled to return the amounts so received, even to the destructon of their corporate existence.

Again, if these contracts were receipts in full for all such claims, then the Treasury Department, in issuing its warrant to such a railroad having an outstanding receipt in full for the items mentioned, would be paying a claim which had already been liquidated, and such payment would be in direct violation of law and return of the amount should be had.

These far-reaching effects make a basis for this petition which we respectfully suggest will warrant this Court in re-

hearing these cases and applying the provisions of the Federal Control Act and of the Transportation Act of 1920 more particularly to the construction of the contracts in issue.

Original Argument.

Counsel for the appellant in the preparation of the brief and in the oral argument before the Court had assumed the allegations in the petition which were to be taken as true were sufficient in themselves to point to a different construction of the contract than the one given by the Court. It was there assumed and argued that the allegations, the contract itself, and the admissions in open Court all showed that the contract was without any consideration whatever, that it was not understood by the parties signing the same to have been executed as a receipt in full for the claims sued on, and it was further assumed that these facts and the law cited indicated that the contracts were to be construed in the light of the other sections of the contract. No departmental construction was therefore presented to the Court, although the departmental construction was instituted immediately after the law went into effect, and it included the well-known process of settlement by the Interstate Commerce Commission, which construction by the Commission forbids the theory that they were paying claims which had been settled by the railroads in the execution of the contract.

To the original argument, therefore, which we here reaffirm, we now wish to add extended departmental constructions which have been followed and which are now being followed in the payment of many millions of dollars for the claims arising during the last 20 months of the period of

Federal control, and which payments cannot be justified in the past or in the future with outstanding receipts in full.

Departmental Construction.

It is unnecessary to cite to this Court the binding effect of departmental construction in such matters as are now presented in this case. The Federal Control Act and the Transportation Act of 1920 were both passed for the purpose of taking care of an extreme situation created by the war with Germany. It was deemed by Congress necessary for the Government to take possession, control, and operation of the railroads, and it did not specify exactly what railroads should be so taken. The Director General of Railroads made objection to the taking of the short-line railroads under control because he thought he did not need them in the general transportation required by the war. Congress early saw the difficulties which would immediately arise if certain railroads were taken and others left, and for this reason, before the Act of March 21, 1918, was passed, Congress inserted in Section 1 of the Federal Control Act the following provision:

> "That every railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken possession, use and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within Federal control as herein defined and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act,"

which provision is not only in the law, but is set out in full in the contract attached to the petition in this case and marked Exhibit A and found beginning on page 6 of the transcript. This insertion in the Federal Control Act, made by Congress just before the Act was passed and directly in refutation of the claim of the Director General and which is expressly referred to in Section 1 of the Transportation Act where it says,

"or under the Federal Control Act,"

shows that the roads now before this Court were taken under Federal Control by direct Act of Congress, anything stated by the Director General in the briefs or arguments in these cases to the contrary notwithstanding. After this insertion in the Federal Control Act and its subsequent approval, the question of the appellant roads being under Federal control from January 1 to July 1, 1918, is not open to further question. This section of the law becomes very important in view of the case now on the docket of this Court, number 991, entitled the *Marion & Rye Valley Railroad Co. vs. The United States.*

The first sections of the Federal Control Act and Sections 202, 203, and 204 of the Transportation Act established forever the question of the liability of the Government to the several railroad companies for the taking of their property for the prosecution of the war. There was no free gift mentioned, but the first sections of the Federal Control Act and of the Transportation Act did provide that these obligations of the Government should be settled according to the provisions of these two statutes. The mode of procedure in both cases was provided. The Government and the railroad should

agree upon the amount to be paid, and in the absence of an agreement, referees should be appointed by the Interstate Commerce Commission and the amounts so found due should be paid, and if not paid, an appeal should be had to the Court of Claims for a judgment which under the law the Treasury Department would liquidate.

It was found difficult under the Federal Control Act to ascertain by expert witnesses the exact amount due in settlement of these claims, and so Congress on February 28, 1920, created the arbitrary measure by which the losses could be easily ascertained, and in a supplemental measure directed the Interstate Commerce Commission, in Sections 204 and 209 of the Transportation Act, to apply this new measure and to settle claims for that part of the Control period during which the short-line railroads operated their own roads. These sections specifically took into account the fact that the Director General had relinquished the great majority of the short-line roads from Federal control, which relinquishment applies to the cases now before the Court. The Interstate Commerce Commission, in pursuance of this Act, immediately began its computation of losses and immediately began the payment of the amounts so ascertained to be due, and the Treasury Department immediately began the actual payments of the amounts. These amounts are many millions of dollars, the exact amount of which payment is immaterial, but these payments are still being made by the Interstate Commerce Commission and the Treasury Department.

If these contracts in suit are payments in full, as construed by the Court, then the Interstate Commerce Commission cannot carry out these provisions of the Transportation Act in any case where a contract had been entered into as in

the case at bar. This contemporary construction by the Interstate Commerce Commission and by the Treasury Department is a convincing construction which is in conflict with the construction given by the Court in this case, because payment cannot be made upon a claim with a receipt in full for that claim on the desk of the payer.

It is perfectly apparent that the contracts in suit do not apply only to the first six months of the period of Federal control. The language of the contract states that it applies to all claims growing out of Federal control, and does not pretend to apply to the first six months only. There is no way that this contract could be applied solely to the first six months of the period of Federal control, and so its provisions apply as well to the last 20 months under the jurisdiction of the Interstate Commerce Commission given by the Transportation Act.

These separate jurisdictions of the Director General and of the Interstate Commerce Commission to settle all these claims for the whole period of 26 months are all provided for in Sections 2, 200, 202, 203, 204, 205, 207, 208, and 209 of the Transportation Act of 1920, and the fact that these jurisdictions do not overlap or interfere with each other does not prevent each Department from being bound by a receipt in full for the whole period.

Return of the Money.

It is apparent that under the present construction of these contracts the payments by the Interstate Commerce Commission to the contract short-line railroads must have been in direct violation of law, and under the general statutes in

such cases made and provided these amounts must be recovered and returned to the Treasury. If such demands should be made upon these short-line railroads in these contract cases, and if the money has to be returned, the road would become insolvent, receivership would follow, the Government would be compelled to take what it could get, bankruptcy would follow in hundreds of cases and would bring an appalling condition at the very time that the Interstate Commerce Commission is exerting itself to carry out the law in bringing about the consolidation of the railroads into a more feasible system of transportation. This very return of the money so paid out would inevitably interfere with the general transportation of the country and the consolidation of railroads now under consideration. This very condition shows that the construction given to these contracts is wrong, and is such an error that the attention of the Court should be called to it. The loss of a few thousand dollars to different short-line railroads for the claims arising during the first six months of Federal control is only a small and insignificant part of the damage wrought by construing these contracts as receipts in full. The first six months of Federal control was about one-quarter of the total period, and perhaps the claims arising during that six months' period would be proportionately one-quarter of the total claims arising during the whole period. If three-fourths of all these claims have been settled and paid, or are in process of settlement and payment, the amount is so great as to warrant the Court in granting a rehearing of these cases and giving all parties an opportunity to present their arguments on the final hearing.

The Marion and Rye Valley Case.

The case of the *Marion and Rye Valley Railroad Company vs. The United States* was decided by the Court of Claims in favor of the defendants, holding that the railroad was never taken under Federal control, and that no obligation on the part of the Government was created in favor of the railroad company, although the Board of Referees found the loss to be something like $15,000. This case presents only one phase of the construction of the Federal Control Act. If the Marion and Rye Valley Railroad was not taken under Federal control, and if no short-line railroad was taken under Federal control, then no obligation arose on the part of the Government in favor of any short-line railroad and all the work of the Director General and the Interstate Commerce Commission in the settlement of any claims in favor of the short-line railroads was illegal, and any money so paid out should be returned to the Treasury. The question as to whether the Marion and Rye Valley Railroad therefore was taken under Federal control becomes not only an important one, but the decision of the Court of Claims in this case brings a condition absolutely appalling. Congress could, then, have meant nothing by the insertion of the paragraph in Section 1 of the Federal Control Act, and the Interstate Commerce Commission has no jurisdiction whatever under the Transportation Act to pay out one dollar to a short-line railroad which was not taken under Federal control. If all of the work of the Interstate Commerce Commission and the Treasury Department is to be declared illegal and void because the short-line railroads were not taken under Federal

control as directed by Congress, then the decision of this Court in the Marion and Rye Valley case, number 991 of the present docket, will be of overwhelming importance, and the case should be advanced and heard at the earliest convenience of the Court, and, as suggested above, the construction of the short-line contracts should be embodied in a general reconsideration, so that these claims might be speedily settled and the Interstate Commerce Commission and the Treasury Department be relieved of the uncertainty, the doubt, and the possibility of illegality of their acts under which extensive proceedings have been had.

Because of these conditions, all of which grow out directly from the decision of the two cases already made and the possible decision of the Court in the case now on the docket and undisposed of, a rehearing is respectfully requested and these cases set in connection with the Marion and Rye Valley case at such a time as would be at the convenience of the Court.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.